

2002

Ronnie Lee Gardner v. Hank Galetka, Warden of the Utah State Prison : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

RONNIE LEE GARDNER,)	
)	
Petitioner/Appellant,)	
)	Case No. 20010875-SC
v.)	
)	
HANK GALETKA,)	
Warden of the Utah)	
State Prison,)	
)	
Respondent.)	
)	

BRIEF OF APPELLANT

APPEAL FROM THE DENIAL OF A POST-CONVICTION PETITION
IN A CAPITAL CASE

THE HONORABLE FRANK G. NOEL, PRESIDING IN THE THIRD
JUDICIAL DISTRICT, SALT LAKE COUNTY, STATE OF UTAH

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UTAH SUPREME COURT

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PAT BARTHOLOMEW
CLERK OF THE COURT

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)	APPELLANT'S OPENING BRIEF
HANK GALETKA,)	
Warden of the Utah)	
State Prison,)	CAPITAL CASE
)	
Respondent.)	
)	

STATEMENT OF JURISDICTION

This is an appeal from the denial of a post-conviction petition challenging the conviction in a capital case. This Court has jurisdiction pursuant to Utah Rules of Civil Procedure 65(o) and to Utah Code Ann. § 78-35a-110.

STATEMENT OF ISSUES PRESENTED

Was the petitioner, Mr. Gardner, denied the effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when his appellate counsel failed to challenge an erroneous instruction on the mental state necessary for a jury finding of first degree capital murder?

Issues of ineffective assistance of appellate counsel are mixed questions of law and

fact. The facts are reviewed in the light most favorable to the lower court findings and the appellate court will not reverse these findings if there is a reasonable basis to support the facts found by the trial court. *Medina v. Cook*, 779 P.2d 658 (Utah 1989). The appellate court exercises de novo review of the legal conclusions for correctness. *Fernandez v. Cook*, 783 P.2d 547 (Utah 1989.)

This issue was preserved by the filing of the petition and the opposition to the Respondent's motion for summary judgment. (See, Petition, R. 1-162; and Petitioner's Response to Motion for Summary Judgment, R. 374-396.)

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

Sixth Amendment, United States Constitution: "In all criminal proceedings, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Fourteenth Amendment of the United States Constitution: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law."

Utah Code Ann. § 76-5-202(1)[in effect in 1985] "Criminal homicide constitutes murder in the first degree if the actor intentionally or knowingly causes the death of another under any of the following circumstances: . . ."

Utah Code Ann § 76-2-103(2): "Knowingly, or with knowledge, with respect to his conduct or to the circumstances surrounding his conduct when is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result."

STATEMENT OF THE CASE

Mr. Gardner was tried and convicted of the capital murder of Michael Burdell in 1985. His conviction and sentence were subsequently affirmed by this Court in *State v. Gardner*, 789 P.2d 273 (1989), *cert. denied*, 494 U.S. 1090 (1990). He then filed a post-conviction petition which was granted in part in 1991. This Court reversed the partial grant of the petition in *Gardner v. Holden*, 888 P.2d 680 (Utah 1994), *cert. denied*, 516 U.S. 828 (1995), affirming the conviction and sentence in the underlying case. Thereafter, Mr. Gardner filed a petition for writ of habeas corpus in federal court which is currently pending. The instant petition was filed on May 10, 2000, in Third District Court. The petition was denied on the merits by Judge Frank G. Noel on October 4, 2001. Mr. Gardner filed a timely notice of appeal from this ruling on October 23, 2001.

STATEMENT OF FACTS

1. Trial Facts

At trial, there was little dispute about the facts surrounding the shooting of Michael Burdell. Mr. Gardner was in custody pending trial on murder charges in an unrelated case.¹ On April 2, 1985, he was due in court for the hearing on pre-trial motions in that case. Prior to his arrival at the courthouse that morning, Mr. Gardner had planned an escape where a small caliber gun would be left hanging on a water fountain in the basement of the

¹Mr. Gardner entered a guilty plea in this other case and is currently serving a life sentence with the recommendation from the trial judge that he remain in custody the remainder of his natural life.

courthouse. (T. 1190-98.)² Rather than leaving the gun as previously planned, an accomplice handed him a .22 caliber handgun in the basement as he was brought in by two guards. (T. 787.) Mr. Gardner's legs were chained together and his hands were cuffed and attached to his waist so that he could raise his hands no more than a few inches above his waist. (T. 1236.) He remained chained in that manner throughout his abortive escape attempt.

Almost immediately after being handed the gun in the basement lobby, Mr. Gardner was shot by Officer Hensley, one of the guards who had entered the building with him. Mr. Gardner was hit in the chest with the officer's .38 caliber bullet, and he sustained a serious injury, which required hospitalization. (T. 790-792; 1107.) Officer Hensley exchanged gun shots with Mr. Gardner in the basement lobby before the officer exited the lobby to the adjacent parking lot area.

Mr. Gardner then entered into an office area off the basement lobby, which housed the archived files from the district court. Inside the archives office were court clerks, a corrections officer and two lawyers, Robert Macri and Michael Burdell. (T. 995-997; 1030-1031)

²The Reporter's Transcript of the trial is contained as Exhibits 3, 4, and 5 to Respondent's Motion for Summary Judgment. The page reference is to the original transcript page rather than the current record page for easier reference and because Respondent's Motion for Summary Judgment has not yet been indexed by the Third District Court.

While Mr. Macri was in the archives office, he heard a commotion in the lobby area. (T. 995.) He looked into the lobby area, saw Mr. Gardner with a gun and hid with Mr. Burdell behind one of the double doors that separated the archives room from the lobby area. (T. 998.) Mr. Macri was six foot two and weighed 300 pounds. (T. 1019.) Almost immediately, Mr. Gardner entered the archives room, went past the doors, behind which the two lawyers were standing and approached the counter area inside the archives room. Mr. Gardner then turned to leave the office and walked within a few feet of Mr. Macri and Mr. Burdell.

Mr. Macri saw that Mr. Gardner was bleeding, looked wounded and very confused. Mr. Gardner had a blank and helpless look. (T. 1026.) Mr. Gardner was still handcuffed and chained at the waist. Mr. Gardner pointed the gun at Mr. Macri but did not say or do anything. Within seconds, Mr. Macri started to flee from behind the doors. (T. 1024-1025.) Mr. Gardner seemed to become aware of the blood from his wound; Mr. Macri heard Mr. Burdell say "Oh, my God," and Mr. Gardner say "Oh, fu-." As Mr. Macri fled, he saw Mr. Gardner move the gun towards Mr. Burdell and he heard the gun fire as he ran out the door to the lobby. (T. 1003; 1024-1025.) The entire encounter at the doors inside the office from the time Mr. Gardner was startled by the lawyers behind the door until the shooting of Mr. Burdell took no more than a few seconds.

After the shooting of Mr. Burdell, Mr. Gardner attempted to exit the back of the archives office. (T. 1037.) There he saw a corrections officer, Richard Thomas, in the rear of the archives office. Officer Thomas was in uniform at the time. Mr. Gardner did

not attempt to shoot this officer. The day of the shooting, Officer Thomas described Mr. Gardner as glassy-eyed, incoherent and being in such a state of panic that he probably didn't recognize Officer Thomas, who knew Mr. Gardner previously. (T. 1052, 1055.) At trial, Officer Thomas testified that he could not remember whether Mr. Gardner was glassy-eyed.

Edward Seamons, a clerk in the archives office, saw Mr. Gardner enter the office, shuffling because of the chains, as he walked past the two attorneys behind the entrance doors. (T. 938-942.) Seamons saw Mr. Gardner turn to exit the office and face the two attorneys. Mr. Seamons believed the gun was aimed at Mr. Burdell's head and was about a foot or so away when the gun "went off." (T. 942-943.)

Mr. Gardner testified to his escape plans (T. 1190) and his intentional firing at Officer Kirk. (T. 1207.) He testified about his chest wound (T. 1200) and the circumstances surrounding the shooting of Mr. Burdell, although he was unable to recall the exact moments of the shooting. (T. 1207) He denied intentionally shooting Mr. Burdell. (T. 1257.)

Raymond Cooper, a firearms expert, testified that the weapon was a .22 caliber revolver, with a single action. (T. 11140; 1148.) He testified that the gun could fire if the hammer was resting against the pin and the hammer was jarred. (T. 1160.) The gun would also fire if the hammer was pulled back while a person's finger was on the trigger. (T. 1154.) He tested the gun by hitting it with a hammer and he could not get the gun to fire from the fully cocked position. (T. 1151.)

2. Counsels' Arguments at Trial and the Erroneous Instruction

During the trial, Mr. Gardner's counsel conceded that he was responsible for the shooting of Michael Burdell, but that the shooting was at most a second degree depraved indifference murder. In opening statements, trial counsel, James Valdez, stated that "We submit, ladies and gentlemen, that Mr. Gardner did not commit a capital homicide. The state has overcharged him in that regard and that what was really committed was a lesser included offense." (T. 759.) Trial counsel focused his entire opening statement on the capital homicide charge and did not mention the other charges once. "A lot of these things we are not going to dispute the obvious, ladies and gentlemen. A lot of these things are so obvious that it is undisputable. But the main element that we want you to look at is the element of intent, the state that Mr. Gardner was in at the time. . . The missing element there is intent, ladies and gentlemen." (T. 763-764.)

Trial counsel informed the jury in the opening statement that in order to find capital murder, "[f]irst you have to find that it was an intentional killing. That's going to be a key word and a key element throughout the trial. Throughout the trial intent is going to be a key issue, I submit, because that intent will decide whether or not this is a capital murder, a second-degree murder or a manslaughter, and if you find there is no intent, then you can't come back – you can't come back with a capital homicide. It is a necessary element to capital homicide which includes the death penalty." (T. 761.)

At the conclusion of the evidence, defense counsel requested a proper definition of the instruction on "knowingly." (Exhibit 8 to Respondent's Motion for Summary Judgment

[“As used in these instructions, a person engages in conduct ‘knowingly’ or with ‘knowledge’ when he is aware that his conduct is reasonably certain to cause the result.”].)

The trial court rejected this instruction and instead improperly instructed the jury in language that did not require the jury to find that the petitioner’s conduct was “reasonably certain to cause the result.” (Exhibit 7 to Respondent’s Motion for Summary Judgment, Instruction #20.)

Instruction #20 reads in its entirety as follows:

A person engages in conduct: (1) “Intentionally” when it is his conscious objective or desire to engage in the conduct or to cause the result; or (2) “Knowingly” when he is aware of the nature of his conduct, *or* the existing circumstances, *or* is aware that his conduct is reasonably certain to cause the result.

(Exhibit 7 to Respondent’s Motion for Summary Judgment [emphasis added].)

The trial court instructed the jury regarding the procedure to follow in considering the lesser included offenses of capital murder in Count I:

If you believe that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt it is your duty to find the defendant guilty of Criminal Homicide, Murder in the First Degree as charged in Count I of the Information. On the other hand, if the evidence has failed to so establish one or more of said elements, of Criminal Homicide, Murder in the First Degree, you shall then consider the guilt or innocence of the defendant of the lesser included offense of Criminal Murder in the Second Degree.

With reference to Count I, you determine his guilt or innocence of Capital Murder, Murder in the First Degree. If that is your verdict, then you don’t have to further consider the included offenses within Count I.

Has (sic) you can see, if you start from the bottom and work up, them (sic) being included offenses, you will find any more or all of those to exist, so you start at the top under Count I, and work down as I have instructed you in the last sentence.

If you find him not guilty of murder in the first degree, you shall then consider the guilt or innocence of the defendant of the lesser included offense of capital homicide, murder in the second degree.

(Respondent's Exhibit 7, Instruction #27a.)

In closing argument, the prosecutor emphasized this instruction to the jury: "[A]nd the court has repeatedly told you you don't explore the lesser included, you don't consider second-degree or manslaughter just because you want to. Only if after considering and evaluating the first-degree murder charge, and if you have a reasonable doubt as to the first-degree, then you consider the others." (T. 1370.)

In closing argument, the prosecutor noted the second required element of first degree murder is "that Ronnie Lee Gardner caused said death either intentionally or knowingly." (T. 1303.) He then acknowledged that this was the key issue in the trial. "From the comments made during opening statements, it is apparent that this is the element, that this is the issue that the defendant contests." (Ibid.) The prosecutor then read the incorrect instruction verbatim to the jury. (T. 1303-1304.) He informed the jury that "that the element of intentionally or knowingly is, again, in the alternative. The state doesn't have to prove both, that he intentionally and knowingly caused the death, only one of them, either intentionally or knowingly. I think this is quite important. As you read the instructions, you see that both are concerned with the conduct or results. Don't have to even intend the results as long as you intend to engage in the conduct that produces the results, and that's the key, the conduct." (Ibid.)

Defense counsel, Andrew Valdez, focused his entire closing argument on the capital homicide charge, conceding that the other offenses were committed by Mr. Gardner.

“[W]e put Mr. Gardner on the stand. And essentially he gave what amounted to a judicial concession perhaps to the aggravated kidnapping and the other related charges.” (T. 1323.)

“The issue we tried to contend with from the outset is the issue of intent. . . .” (Ibid.) This theme ran throughout the closing argument. “So you have to look to see if he had the intent to kill when he, in fact acted. It is not whether he intended his conduct to be a certain way, it is whether he intended to kill Mr. Burdell at the point when he saw the blur and heard the explosion.” (T. 1345.) In conclusion, trial counsel stated, “[T]here is going to be reasons to doubt that he is guilty of an intentional killing. And we submit to you, ladies and gentlemen, then that he is guilty of second-degree murder or manslaughter but not intentional killing.” (T. 1355.)

The jury convicted petitioner of first degree murder; however, the verdict form does not reflect whether the mental state element was based on an intentional or knowing killing. (Exhibit 7 to Respondent’s Motion for Summary Judgment, p. 598.)

3. Mr. Gardner’s Direct Appeal

Mr. Gardner was represented on direct appeal by attorneys other than trial counsel within the Salt Lake Legal Defender’s Association. The issue concerning the erroneous jury instruction on the mental state requirement for first degree murder was not raised on appeal. Both of Mr. Gardner’s appellate counsel have stated that they did not purposely

exclude this issue from the direct appeal. (Exhibit E to Petition, R. 97; Exhibit F to Petition, R. 141.)

4. The District's Court Decision on the Merits of the Petition

In its Memorandum Decision denying the petition on the merits, the district court found that the state conceded that the mental state instruction given by the trial court was in error. (R. 436.) The district court also concluded that the assignment of error could have been raised on direct appeal and addressed by the Supreme Court even under the principles of plain error. The district court however found that Mr. Gardner suffered no prejudice from counsel's error because the Supreme Court would have found the erroneous instruction to be harmless beyond a reasonable doubt and thus, there was no reasonable probability of a different result. (R. 438-439.)

SUMMARY OF ARGUMENT

Mr. Gardner was denied the effective assistance of counsel because his appellate counsel failed to challenge on appeal the giving of an improper instruction on the critical element of the requisite mental state for conviction of an intentional or knowing killing. While trial counsel requested a proper instruction in the language of the applicable statute, the trial judge gave an instruction which the state now concedes is erroneous.

While the district court in this petition found that the instruction was erroneous and that the instruction involved the critical issue before the jury, the court's conclusion that this error was harmless was incorrect. When a jury is misinstructed on a required element of the charge, reversal is automatic. Even if a reversal per se standard is not applied, the

error in this case was not harmless, because the element was contested and there was sufficient evidence presented at trial to support a contrary finding had the jury been properly instructed.

FAILURE TO CHALLENGE THE ERRONEOUS JURY INSTRUCTION DENIED MR. GARDNER HIS RIGHT TO EFFECTIVE APPELLATE COUNSEL

1. The Standards of Ineffective Assistance of Appellate Counsel

The United States Supreme Court has established the clear law regarding the process by which a court is to determine if a defendant has been denied the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984).

The proper standard for this Court to apply is whether, in light of all the circumstances, counsel's acts or omissions were outside the range of professionally competent assistance.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687.

Appellate courts in this state have consistently applied the same two prong standard established in *Strickland*. when assessing the issue of ineffective assistance of appellate counsel. "The standard for judging ineffective assistance of appellate counsel is the same

as the standard for judging ineffective assistance of trial counsel.” *Bruner v. Carver*, 920 P.2d 1153 (Utah 1996); *Butterfield v. Cook*, 817 P.2d 333 (Utah App. 1991), *cert. denied*, 826 P.2d 651 (Utah 1991).

Appellate counsel may be ineffective if counsel fails to raise a meritorious issue on appeal, even if other strong but unsuccessful claims were raised. *Carter v. Galetka*, 2001 Ut 96, ___ P.3d. ____ (Utah 2001). Following the Tenth Circuit’s analysis of this issue, this Court has indicated that the omitted issue should be obvious from the record and one which probably would have resulted in reversal on appeal. *Ibid.*, citing *Banks v. Reynolds*, 54 F.3d 1508, 1515, n. 3 (10th Cir. 1993).

Thus, while the particular constitutional protection may flow from the Fourteenth Amendment rather than the Sixth Amendment, the legal and factual analysis of the issue of ineffective assistance of appellate counsel is the same as that when trial counsel’s representation is at issue.

2. The Performance Prong of *Strickland* in this Case

The analysis of the representation of appellate counsel must begin with the fact that there is no question that the instruction provided the jury is an erroneous statement of the law. The proper definition is contained in the relevant statute. See, Utah Code Ann. § 76-2-103. The State forthrightly has conceded this fact and the district court acknowledged this fact as well. Moreover, the error is reflected on the face of the trial court record which was reviewed by appellate counsel. This record shows that trial counsel requested the proper instruction, that the trial court gave an improper instruction, and that the prosecutor

in closing arguments read the improper instruction to the jury and emphasized the error in his arguments to the jury.

In this case, while appellate counsel raised numerous issues on appeal, they overlooked a clear error contained on the face of the record which went to the sole issue contested at trial – Mr. Gardner’s mental state when he shot Mr. Burdell. Nor can this failure cannot be attributed to a tactical decision to abandon this issue for some legal reason. Neither appellate attorney testified that the issue was examined, researched and then rejected in favor of stronger more meritorious issues. Thus, this case is unlike *Smith v. Murray*, 477 U.S. 527 (1986) in which the United States Supreme Court held that a deliberate tactical decision to abandon an issue after an examination of the record is within the bounds of professional conduct for appellate counsel.

Butterfield is instructive on the procedure this Court must follow in examining the legal issue de novo. There, the appellate court examined each of the alleged omissions of appellate counsel and the reasons for each omission. Appellate counsel testified that they had examined each issue and gave specific reasons for the decision not to raise a particular issue. Counsel also testified that they believed the main appellate claim was meritorious and that they intentionally focused their attention on that issue. Nevertheless, the court found that appellate counsel failed to meet the performance prong of *Strickland* because their legal conclusion on one issue of the admission of evidence of prior sexual experience

was incorrect.³ On another issue, the court did not reach the question of whether the failure to raise a non-frivolous issue fell below the reasonableness standard, deciding the issue instead on the basis that petitioner could not meet the prejudice prong. *Butterfield*, 817 P.2d at 338.

Here, Mr. Gardner has demonstrated that this claim was not examined and rejected for any strategic or legal reason. It was simply overlooked by appellate counsel. Thus, he has met the first prong of the test.⁴

3. The Prejudice Prong of *Strickland* in this Case

Without citation to case law, the district court concluded that Mr. Gardner could not show prejudice because the district court concluded that the error was reviewable under a harmless error standard. Mr. Gardner contends first that the district court erred by not applying a per se standard for reversal, given the nature of the instructional error, and second that even under harmless error review, reversal is required.

³The appellant/petitioner in *Butterfield* did not meet the prejudice prong because the appellate court determined that the error was harmless and therefore not prejudicial, as did the district court here. As more fully discussed below, the district court's legal conclusion on the prejudice prong of *Strickland* is erroneous and requires reversal in this case.

⁴The district court memorandum decision appears at one juncture to mix the two prongs. (See, R. 438-439.) The court there concluded that appellate counsel were not "deficient" because "the raising of the issue would not have resulted in a different outcome." While this formulation may not be correct, it is not necessary to reach this language in consideration of this appeal. The district court in essence adopted a proper methodology of *Strickland* error by examining the prejudice prong separately from the performance prong. (See, *Butterfield v. Cook*, 817 P.2d at 337.) However, in this case, the district court had already, and properly, found that Mr. Gardner had established his proof of the performance prong by concluding that appellate counsel should have raised a challenge to the erroneous instruction. (See, R. 436.)

In this case, as the district court properly found, the central issue in the trial was the mental state of Mr. Gardner at the time he shot Mr. Burdell. (R. 436 [“the central issue for the trier of fact was the intent of Mr. Gardner at the time of the shooting.”].) The critical element for the mental state required for an intentional or knowing killing is a specific intent to kill or a mental state equivalent to a specific intent to kill. This mental state has been described by this Court as having the “purpose to kill.” *State v. Standiford*, 769 P.2d 254, 260, n. 3 (Utah 1988). “We believe, on the contrary, that the term ‘specific intent’ has utility in describing a culpable mental state, or mind set, that describes a required purpose, knowledge, attitude, or motive, in addition to the mere volitional act, such as pulling a trigger, which has no inherent moral value but causes a killing.” *Ibid.* This Court has elsewhere described the mental state as one of “intent to kill or knowledge that one’s acts would result in death if carried out.” *State v. Gardner*, 947 P.2d 630, 642 (Utah 1997)(Durham, J., plurality opinion.)⁵

Here, the jury instruction did not distinguish for the jury Mr. Gardner’s act in pulling the trigger or holding the gun as it went off, which clearly caused Mr. Burdell’s death, from the required intent to kill or its moral equivalent required by the statute. Thus, the instruction was not only a misstatement of Utah law, it also violated due process of law as

⁵While this language is stated in the context of an attempted murder charge, the appellate courts have consistently held that to be guilty of attempted murder the defendant must have the identical mental state required for the completed offense. See, e.g., *State v. Johnson*, 821 P.2d 1150, 1156-1157 (Utah 1991). What is lacking in this case is an instruction requiring knowledge that the acts would cause Mr. Burdell’s death.

guaranteed by the Fourteenth Amendment under *Sandstrom v. Montana*, 442 U.S. 510 (1979). The jury was able to convict petitioner solely on his being aware of his conduct, thus improperly permitting the jury to presume the requisite mens rea for first degree murder.

Moreover, the prosecutor used this erroneous instruction to inform the jury that Mr. Gardner did not have to “intend the results as long as he intended to engage in the conduct that produces the results, and that the key, the conduct.” (T. 1304-1305; R. 49-50.) The prosecutor even focused on Mr. Gardner’s general plan of escape rather than the conduct at the time Mr. Burdell was shot.

In this context, the instruction omitted an essential element of the mens rea necessary for a proper finding of first degree murder. The jury could well have adopted the prosecutor’s arguments and the improper instruction and based the verdict on a finding that Mr. Gardner was aware of his actions in attempting to escape with a gun and that during the escape Mr. Burdell was killed. This would permit the jury to convict without ever requiring the prosecution to make the showing that Mr. Gardner had the intent to shoot Mr. Burdell, or was reasonably certain to know that his acts would cause the death of Mr. Burdell.

Not only did the erroneous instruction go to the key element in this case, it also involved Mr. Gardner’s mental state which is an essential element of the charge of first degree murder. This mental element applies only to first degree murder in this case as the jury was not instructed on an intentional or knowing second degree murder.

“The general rule is that an accurate instruction upon the basic elements of an offense is essential. Failure to so instruct constitutes reversible error.” *State v. Roberts*, 711 P.2d 235, 239 (Utah 1985). While not addressed by the district court, the State argued below that reversal is only warranted when the court fails to instruct entirely on an element of the offense. See, *State v. Jones*, 823 P.2d 1059 (Utah 1991). This case holds that failure to instruct on an element of the offense requires per se reversal. However, this case relies on the language from *Roberts* thus implying that an inaccurate instruction of the essential elements of the offense is the equivalent of the absence of the instruction. In *Jones*, this Court wrote that “[t]he jury must be instructed with respect to all the legal elements that it must find to convict of the crime charged, and that the absence of such an instruction is reversible error as a matter of law.” *Jones*, 823 P.2d at 1061. Thus, the misinstruction in this case has the same impact as a failure to instruct on an element of the offense, because the erroneous mens rea instruction allowed the jury to convict without ever finding beyond a reasonable doubt that Mr. Gardner had the requisite mens rea under the statute. Thus, automatic reversal is required, and the district court erred by applying harmless error review.⁶

Even if automatic reversal is not mandated, the prosecution has the burden of showing that the instruction error was harmless beyond a reasonable doubt since it involves

⁶While the United States Supreme Court has held that such instructional error is subject to harmless error review, that holding does not prohibit this Court from applying a higher standard for the error in this case. (See, *Neder v. United States*, 527 U.S. 1 (1999).)

a federal constitutional right in that the failure to instruct the jury properly on the element of the offense denied him a fundamentally fair trial as guaranteed by the Fourteenth Amendment to the United States Constitution.

The harmless error test requires the prosecution to demonstrate “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Chapman v. California*, 386 U.S. 18, 24 (1966). The harmless error inquiry in the instructional error context must be: “Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?” *Neder*, 527 U.S. at 18. As the Supreme Court noted in *Neder*:

Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error – for example, where the defendant contested the omitted element and raised sufficient evidence to support a contrary finding – it should not find the error harmless.

(*Id.* at 19.)

Given the disputed nature of Mr. Gardner’s mental state at the time Mr. Burdell was shot, the prosecution cannot meet its this high burden. The required element was the *only* disputed issue at trial. In addition, Mr. Gardner presented sufficient evidence to warrant a contrary finding as the trial court gave a number of lesser included instructions based solely on the mental state evidence and on the contested issue of the mental state element of the various degrees of murder and manslaughter.

Thus, the district court erred by concluding that no rational juror would have returned a verdict other than first degree murder had the jury been properly instructed. The district court erred by concluding that the record demonstrated that Mr. Gardner would automatically been guilty of first degree murder because no jury would have found that he was not reasonably certain to know that the firing of a “large caliber handgun” would have caused the death of Mr. Burdell. (R. 438-439.)

The district court’s conclusion is based on an erroneous reading of the facts – that the weapon was “a large caliber handgun.” If the record does not support the factual conclusions of the district court, this Court can make the proper factual finding. *Medina v. Cook*, 779 P.2d 658 (Utah 1989). Here, the record reflects that the gun was .22 caliber revolver, a small caliber weapon. (T. 1157.) Thus, had the bullet hit Mr. Burdell a mere inch or two away from its actual point of entry, Mr. Burdell might have suffered only minor injuries. The weapon was not the type which would have created damage to a wider area as a “large caliber handgun” would have. Reversal is required on this factual error in the district court’s ruling alone.

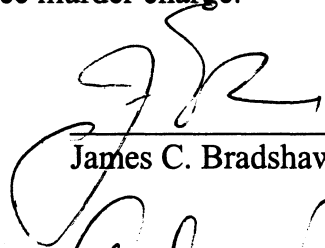
In addition, the error concerned the critical aspect of the entire trial. Contrary to the district court’s conclusion, the judge at trial found that there was sufficient evidence to provide lesser included instructions on “depraved indifference” and “recklessness.” By finding the instructional error harmless, this Court would have to find beyond a reasonable doubt that no rational jury could have returned a lesser verdict in this case had the jury been


properly instructed.⁷ No such legal conclusion is warranted on the basis of the record which includes the two factors examined by the United States Supreme Court in these circumstances – contention between the parties on the specific erroneous element and sufficient evidence to support a contrary finding. Therefore, reversal of the district court ruling is required.

CONCLUSION

Based upon the foregoing and the record in this case, it is hereby respectfully requested that this Court reverse the dismissal of the petition in this matter and order a new trial for Mr. Gardner on the first degree murder charge.

Dated:



James C. Bradshaw


Andrew Parnes
Attorneys for Appellant
Ronnie Lee Gardner

⁷Because of the specific jury instruction regarding how the jury should consider lesser included verdicts in this case (Instruction 27A) and the prosecutor's closing argument (T. 1370), the fact that these other instructions were given is not relevant to the harmless error determination here.

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLANT was mailed, postage prepaid, to Thomas Brunker, Assistant Attorney General, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84111, on the 30 day of April 2002

Minum Carter

ADDENDUM

ADDENDUM A

INSTRUCTION NO. 20

A person engages in conduct:

1. "Intentionally" when it is his conscious objective or desire to engage in the conduct or to cause the result; or
2. "Knowingly" when he is aware of the nature of his conduct, or the existing circumstances, or is aware that his conduct is reasonably certain to cause the result.

ADDENDUM B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

RONNIE LEE GARDNER,	:	MEMORANDUM DECISION
Petitioner,	:	CASE NO. 000903842
vs.	:	
HANK GALETKA, Warden, Utah	:	
State Prison,	:	
Respondent.	:	

The Court has reviewed the Motion for Summary Judgment, together with the Memoranda filed in connection with the Motion, and having heard oral argument and taken the matter under advisement, now rules as follows:

Issues regarding whether the petitioner is procedurally barred from making this claim were resolved by the Memorandum Decision of Judge Leslie A. Lewis in February, 2001, prior to her recusal in this case. This Motion for Summary Judgment goes to the merits of petitioner's claim, and both parties have agreed that an evidentiary hearing is unnecessary and that the Court can make the decision on the merits of the case based on the record, when ruling on this Motion for Summary Judgment.

The single issue in this case is whether appellate counsel for Mr. Gardner provided ineffective assistance when they failed to include in their appeal of the underlying criminal case, the claim

that the jury at the time of trial was improperly instructed on the definition of an intentional and knowing killing.

The standard for determining ineffective assistance of appellate counsel for purposes of this case is the same as the standard for determining ineffective assistance of trial counsel. See, Strickland v. Washington, 466 U.S. 668 (1984); and Bruner v. Carver, 920 P.2d 1153 (Utah 1996). Petitioner must show that (1) appellate counsel's representation fell below an objective standard of reasonable conduct, and (2) that counsel's deficient performance prejudiced the defendant. Under the facts and circumstances of this case, an analysis of counsel's performance overlaps somewhat into the second prong of the Strickland test, i.e., whether defendant was prejudiced. For example, how could counsel's performance in failing to include the "knowing" jury instruction issue in their appeal fall below the required standard if there was no reasonable likelihood that there would be a different outcome even if they had included the issue in the appeal. And because the Court's ruling on the "prejudice prong" of Strickland is dispositive of this case, the Court will turn to that analysis first.

The State argues that petitioner could not have been prejudiced, even if there was deficient performance, because appellate counsel was precluded from raising the issue since it was

not preserved for appeal. Mr. Gardner argues, on the other hand, that the issue was preserved for appeal simply by the submission to the trial court by defense counsel of the correct jury instruction, even though defense counsel did not subsequently object on the record to the instruction given by the Court. Mr. Gardner also argues that it does not matter that the issue was not preserved on appeal, since this was plain error and worked a manifest injustice to the petitioner. The Court is not persuaded by the State's argument. In this case, the central issue for the trier of fact was the intent of Mr. Gardner at the time of the shooting. Both parties have agreed that the instruction on an intentional and knowing killing was in error, and this Court is of the opinion that it is therefore clear on the record, and that had the Supreme Court felt that the erroneous instruction tainted the jury verdict or that the submission of the correct instruction may have resulted in a different outcome, then they clearly could have addressed the issue.

This Court is also not persuaded, however, that had the issue regarding the improper instruction been raised on appeal, there would have been a probability of a different outcome. The Court finds this to be so for the following reason. The jury instruction in question is based on Utah Code Ann., Section 76-2-103, which reads as follows:

A person engages in conduct:

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

The trial court instructed the jury as follows:

A person engages in conduct:

1. Intentionally when it is his conscious objective or desire to engage in the conduct or to cause the result, or

2. Knowingly when he is aware of the nature of his conduct or the existing circumstances, or is aware that his conduct is reasonably certain to cause the result.

Petitioner argues that the statutory definition of "knowingly" requires that the actor not only be aware of the nature of his conduct, but that his conduct would be reasonably certain to cause the result, whereas the instruction given by the Court would permit the jury to determine guilt based upon a finding that the actor was aware of the nature of his conduct but did not necessarily understand that his conduct was reasonably certain to cause the result.

It is significant to know that petitioner's defense in the criminal case was that he did not know what he was doing when he

shot Mr. Burdell, but did not present evidence on the second prong of the "knowing" instruction, that is, that he was not aware his conduct was reasonably certain to cause the result. The error in the "knowing" instruction now claimed by petitioner does not go to the disputed issue in the case, that is, whether petitioner knew what he was doing when he shot Mr. Burdell in the face.

All that aside, however, the Court is persuaded that petitioner suffered no prejudice because of the erroneous instruction, for the following reason: petitioner must concede that the jury found either that petitioner intentionally killed Mr. Burdell, in which case that would be the end of the matter, or that they found the killing was "knowing." If the jury found that the killing was "knowing," then in order for petitioner to prevail in this case, he would have to argue that the jury found that he was aware of the nature of his conduct but, had the instruction been correctly given to them, would have found that he was not aware that his conduct was reasonably certain to cause the result. Under the facts and circumstances of this case, that would be a fantastic claim. Mr. Gardner would have to convince the jury that he was aware of his conduct in pointing and firing a large caliber handgun into the face and head of Michael Burdell, but was not aware that death was reasonably certain to follow. The Court is of the opinion that no rational juror would make such a finding. It

appears to the Court that the evidence is overwhelming that if Mr. Gardner understood the nature of his conduct in shooting Mr. Burdell from approximately 1-1/2 feet in the face with a large caliber handgun, then he would know that death was reasonably certain. Petitioner in this case has failed to prove by a preponderance of the evidence or even by a reasonable probability that had the issue of the erroneous instruction been raised by appellate counsel, that there may have been a different outcome. The Court is of the opinion that had this issue been addressed by the Supreme Court, that they would have analyzed the prejudice issue in a similar fashion and that the State would have been able to show beyond a reasonable doubt the harmlessness of the error.

Returning to the issue of whether appellate counsel's performance was deficient, the Court notes again that this issue overlaps into the issue of prejudice. While appellate counsel's performance might be said to be deficient in failing to raise on appeal the issue of an erroneous instruction regarding the intent of the petitioner at the time of the shooting, how can it be said to be deficient if the raising of that issue would not have resulted in a different outcome? For that reason alone, the Court finds that appellate counsel's performance did not fall below the required standard.

For the reasons stated above, the Court grants the Motion for Summary Judgment and dismisses the Petition.

Counsel for the respondent is to prepare an appropriate set of Findings of Fact, Conclusions of Law, and an Order.

Dated this 5 day of September, 2001.

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FRANK G. NOEL
DISTRICT COURT JUDGE

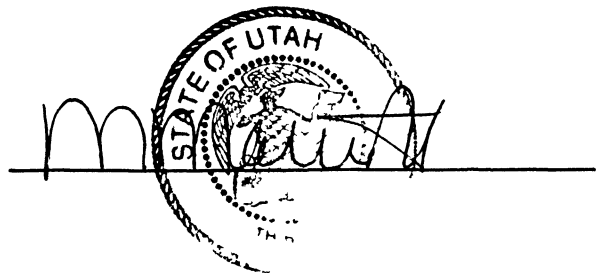
MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 5 day of September, 2001:

James C. Bradshaw
Attorney for Petitioner
10 W. Broadway, Suite 210
Salt Lake City, Utah 84101

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A handwritten signature, possibly "m. [unclear]", is written over a circular seal. The seal features the text "STATE OF UTAH" around the top and "JAN 2 2002" around the bottom. The center of the seal contains a stylized mountain and sun emblem.

ADDENDUM C

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Attorneys for Respondent

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

RONNIE LEE GARDNER,	:	UNDISPUTED FACTS,
Petitioner,	:	CONCLUSIONS OF LAW,
	:	ORDER DISMISSING
v.	:	PETITION FOR POST
	:	CONVICTION RELIEF, AND
HANK GALETKA, Warden, Utah	:	JUDGMENT FOR RESPONDENT
State Prison,	:	
	:	Judge Frank G. Noel
Respondent.	:	Case No. 000903842

On August 3, 2001, the Court heard argument on respondent's second summary judgment motion. Thomas Brunker appeared for respondent, Andrew Parnes and James Bradshaw appeared for petitioner. Petitioner was present. Having heard argument and having reviewed the papers filed on the summary judgment motion, the Court: 1) finds that, for purposes of the motion, the parties do not dispute the facts recited below; 2) makes the

conclusions of law recited below; and 3) grants respondent's summary judgment motion, dismisses the petition with prejudice, and enters judgment in respondent's favor.

UNDISPUTED FACTS

1. The State of Utah charged petitioner with first degree murder for killing Michael Burdell while trying to escape from the Metropolitan Hall of Justice in 1985.

2. In order to convict, the State had to prove that petitioner caused Mr. Burdell's death either "intentionally" or "knowingly," and the existence of at least one statutory aggravating circumstance.

3. Utah defined the "intentional" and "knowing" mental states as follows:

A person engages in conduct:

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

4. For purposes of this motion, the parties do not dispute that proving petitioner "knowingly" killed Mr. Burdell required

the State to prove both that: 1) petitioner was aware of the nature of his conduct or the existing circumstances; and 2) petitioner was aware that his conduct was reasonably certain to cause Michael Burdell's death.

5. Petitioner's mental state at the time he shot Mr. Burdell was the central issue during the guilt phase of petitioner's capital trial. The State called several eye witnesses to testify about petitioner's actions at the time of the murder. Petitioner testified to his version of the events. The parties have detailed the relevant portions of that testimony in their memorandum, and the Court adopts by reference those recitations.

6. In its jury instructions, the trial court defined "intentionally" and "knowingly" as follows:

A person engages in conduct:

1. "Intentionally" when it is his conscious objective or desire to engage in the conduct or to cause the result; or

2. "Knowingly" when he is aware of the nature of his conduct, or the existing circumstances, or is aware that his conduct is reasonably certain to cause the result.

For purposes of this motion, the parties do not dispute that this single instruction incorrectly states what the State must prove to demonstrate a "knowing" killing.

7. The jury convicted petitioner of first degree murder and sentenced him to death.

8. Petitioner's appellate counsel did not challenge the sufficiency of the trial court's instruction defining "knowingly."

9. The Utah Supreme Court affirmed the conviction and sentence on direct appeal.

10. Petitioner previously filed a state post conviction petition. The post conviction trial court granted the petition in part and denied it in part. The Utah Supreme Court reversed that part of the trial court's order granting relief and held that petitioner was not entitled to relief.

11. In response to this second petition, respondent first moved for summary judgment based on procedural bar. The Court denied that motion. The motion at issue addresses the petition's merits.

CONCLUSIONS OF LAW

1. Petitioner raises a single issue: whether counsel's failure to challenge the trial court's definition of "knowingly" deprived him of the appellate representation that the Sixth Amendment to the United States Constitution guaranteed.

2. In order to succeed on the claim, petitioner must prove:
1) appellate counsel's representation fell below an objective

standard of reasonableness; and 2) counsel's deficient performance prejudiced petitioner. Under the facts and circumstances of this case, the two prongs overlap. That is, counsel could not have performed below an objective standard of reasonableness if an appellate challenge to the "knowingly" definition would not have succeeded on appeal.

3. The trial court erroneously defined "knowingly." The record clearly demonstrates that, had the Utah Supreme Court concluded that the instruction tainted the jury verdict, it would have addressed the claim.

4. Petitioner has not proven a reasonable probability of reversal if counsel had challenged the trial court's "knowingly" definition. Petitioner contends that the instruction allowed the jury to convict him of first degree murder merely by finding that he knew what he was doing without also finding that he knew his actions were reasonably certain to cause Mr. Burdell's death. No rational juror could find that petitioner knew what he was doing when he pointed and fired the gun into Mr. Burdell's face from approximately 1.5 feet away, but was not aware that it was reasonably certain to cause Mr. Burdell's death. The evidence to the contrary was overwhelming.

5. Because there is no reasonable probability that the supreme court would have reversed if appellate counsel had raised

the claim petitioner contends they should have raised, appellate counsel did not perform objectively unreasonably. If appellate counsel had raised the claim, the State could have shown beyond a reasonable doubt that any error in the instruction was harmless.

ORDER AND JUDGMENT

Based on the papers filed, the parties arguments, and the undisputed facts and legal conclusions cited above,

IT IS HEREBY ORDERED:

1. Respondent's summary judgment motion addressing the merits of the petition is GRANTED;
2. The petition is DISMISSED with prejudice;
3. The Court orders judgment entered in respondent's favor.

DATED _____.

BY THE COURT:

Frank G. Noel
District Court Judge, Third District

Approved as to form:

ANDREW PARNES
JAMES BRADSHAW

Counsel for Petitioner